United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1401, 76-1407

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

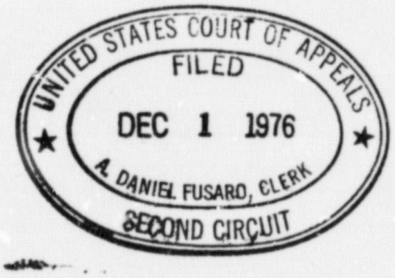
ALAN MICHAEL FITZGERALD and
ERIC STANCHICH,

Defendants-Appellants.

Docket No. 76-1401
Docket No. 76-1407

REPLY BRIEF FOR APPELLANT
ERIC STANCHICH

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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In appellant's main brief, it is argued that Fitzgerald's hearsay statements that he would "get rid" of appellant if McDonnell so wished (152-154) and Fitzgerald's constant hearsay reference to "his people" (50, 138, 140-143, 148) should not have been admitted as evidence of appellant Stanchich's involvement with Fitzgerald, since the court below found that a conspiracy had not been established by a preponderance of the non-hearsay evidence. The Government's response, inter alia,

is first, that the above statements were not hearsay; second, that if inadmissible, the error in admitting them was harmless; and third, that proper objection was not taken to introduction of the statements against appellant.* None of the above assertions withstands analysis.

The Government defends receipt against appellant Stanchich of Fitzgerald's repeated references to "his people" as verbal acts, lending significance to otherwise ambiguous conduct. Reliance on that doctrine is foreclosed by this Court's decision in United States v. D'Amato, 493 F.2d 359, 363-364 (2d Cir. 1974). In D'Amato, one of the co-conspirators, Burdieri, stated that he was going to meet "his people" at a particular time. That evening, he in fact met with defendant Abramo. In determining whether the evidence aliunde from the co-conspirator's hearsay would establish Abramo's participation in the conspiracy, the court determined that Burdieri's reference to "his people" could not be considered, since it was hearsay, as to Abramo. Id., 493 F.2d at 364; accord, United States v. Oliva, 497 F.2d 130, 132 (5th Cir. 1974) (statement referring to "his people in Key West"). The references in this case, which were far more numerous, are absolutely identical to those held to

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*The Government's other assertions, that the trial court in fact found an agency relationship permitting admission of the statements and that such a "decision" was proper, are adequately covered in appellant Stanchich's main brief at 15-23 and do not require additional response.

be hearsay in D'Amato. Indeed, the Government does not suggest otherwise.*

Even less meritorious is the Government's claim that Fitzgerald's statements in the ~~Compass~~ Blarney Stone Bar that he would "get rid" of appellant if McDonnell so wished were admissible against appellant in the absence of an an agency relationship or appellant's adoption of the statements in some other fashion. First, the Government's argument that the statement was admissible as evidence of Fitzgerald's present intent is beside the point. While the statement may have been admissible for that and other reasons as to Fitzgerald, it was still hearsay against appellant Stanchich in the absence of the latter's adoption of the statement or agency relationship. United States v. Flecha, 539 F.2d 874, 878 (2d Cir. 1976). In fact, for that reason, the court below rejected the Government's argument that Fitzgerald's statement was independently admissible against appellant as a verbal act (328), a finding entirely ignored by the Government in its brief.

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*Instead, the Government suggests that D'Amato is inconsistent with this Court's decisions in United States v. Ragland, 375 F.2d 471. 478 (2d Cir. 1967), cert. denied, 390 U.S. 925 (1968), and United States v. Annunziato, 293 F.2d 373, 376-378 (2d Cir.), cert. denied, 368 U.S. 919 (1961). No argument whatsoever is advanced to explain in what way the decision in D'Amato is inconsistent with Ragland and Annunziato, and we are unable to divine one.

Moreover, it is clear that the statement was not offered as evidence of Fitzgerald's present intent, but as a pure hearsay admission by Fitzgerald of appellant Stanchich's involvement in the scheme. McDonnell's questions to Fitzgerald were cleraly designed to secure a hearsay concession that Stanchich and Napoli were involved in the enterprise. While the statement finally elicited from Fitzgerald -- that he would "get rid" of Stanchich -- was a far more ambiguous indication of appellant's role than the Government would have wished, it was used by the Government in its summation as clear evidence of appellant's participation in the scheme.

The Government's next argument is that the restricted admission of all the above statements, if error, was harmless since Fitzgerald's statement in the ~~Compass~~ Blarney Stone Bar was not "directly inculpatory of Stanchich" and since the references to "his people" "do not name Stanchich or implicate him in any way" (Government Brief at 18, 16). Unfortunately, the position taken by the Government on the importance of these statements for purpose of the appeal is directly at odds with that taken in its summation at trial. There, the Assistant U.S. Attorney focused considerable attention on Fitzgerald's statements at the ~~Compass~~ Blarney Stone Bar, and argued to the jury that they were nothing less than clear statements by Fitzgerald of appellant Stanchich's involvement:

> McDonnell tries to get him to do the deal and he can't, so McDonnell says to him having noticed Stanchich, he says, you know,

"I saw Stanchich in the lobby today of that entranceway of the diner, rather, when I left," and you remember he did see him. Is he in this deal? "Mind your own business. Don't ask me about my side of the deal."

I saw somebody else. McDonnell hadn't but he had been told that somebody else was there, Napoli, with Stanchich. "Is he in the deal?" "I told you, mind your own business."

"Well, look, if they are in this deal let's get them in here, let's talk it out, maybe I can convince them to give me the whole package."

"Don't ask me about my end of the deal."

"I don't want Stanchich around. If I get Stanchich around I don't want somebody to know me to see me doing this deal."

"Don't worry about it, by the time you get back with the money from the bank I'll get rid of them."

I'll get rid of them. Not I don't know what you are talking about, not they will probably be gone. Just I'll get rid of them. I'll tell them to make sure they are not around so you won't get nervous. I'll instruct them, is what he is saying.

Who do you instruct? You instruct your people in the deal. You don't instruct a friend, you don't instruct somebody you see on the street; you instruct your cohorts, your fellow schemers, that to make this deal go don't be here.

(366-367; emphasis added).

Similarly, constant reference was made by the Assistant U.S. Attorney to Fitzgerald's statement -- now claimed to be innocuous -- about "his people":

Lurie looks at it, he says, "Okay, can I

borrow it, show it to my people?

"No, no, before you show it to your people, I have to get permission from my people to let it out of my hands."

My people.

(356).

* * *

"Well, I'll go back and speak to my people again but it is kind of doubtful."

McDonnell said, "Go back and speak to your people. Call me in a couple of days. Call me 9:15, I will be in the bank, you know my number."

McDonnell leaves.

When McDonnell leaves we begin to find out who his people are, because when McDonnell leaves you will remember a man started walking behind him by the name of Vincent Napoli, and then he joined another man, Eric Stanchich, and they both started walking behind Mc onnell.

(360).

(See also 359, 365).

It is simply impossible to know whether the argument so earnestly advanced by the Government at trial was accepted by the jury. But the force and frequency of the Government's arguments concerning Fitzgerald's hearsay statements makes it clear that it was the Government's position that this evidence was an important part of the case against appellant.

Moreover, a finding of harmless error is impossible here, given the weakness of the case against appellant. Compare, United States v. Ong, Doc. Nos. 76-1087, 76-1088, 76-1093,

76-1094, slip op. 5517, 5519 (2d Cir., September 14, 1976). Even if this Court were to find that the Government's evidence was sufficient, it is clear that the Government produced no direct evidence of appellant's stake in the venture, and none of his knowledge that the notes were even Treasury notes, let alone counterfeit.

Finally, there is equally no merit to the Government's claim that this issue was not properly preserved by appellant's objection. Appellant objected to the admission of Fitzgerald's statements in the ~~Compass~~ Blarney Stone Bar, evidence which was admitted subject to connection (153). Counsel also objected to the statements by Fitzgerald on November 10 (73), a date that includes the majority of Fitzgerald's references to "his people" (138, 139, 140-143).

More importantly, appellant unsuccessfully attempted to register his disagreement to the court's contradictory determinations that the evidence received subject to connection, although inadmissible to establish appellant's participation in a conspiracy, could be used by the jury as evidence of appellant's involvement with Fitzgerald on the substantive counts. That disagreement was brushed aside by the court:

> You can only lose at this point, Mr. Schacher. The motion that you made has been granted. The subject to connection aspect is essentially a conspiracy question as I have viewed it requiring the showing of some independent evidence by a fair preponderance of proof in order for it to be received.

> As to the substantive counts, I consider it to be received without limitation.
>
> (334; emphasis added).

Contrary to the Government's assertion, the court's determination on this question came immediately after a discussion of the non-hearsay evidence against appellant, and could only have been taken as a decision on the admission of Fitzgerald's hearsay statements (318, 323-333). At that point, the court had clearly ruled that all the subject to connection evidence, which includes Fitzgerald's statements as well as the exhibits introduced into evidence, was being received without limitation. Not only would a request to charge on the limited nature of Fitzgerald's statements have been needlessly repetitious, but the court explicitly informed counsel that he "could only lose" if he pressed his objection. It would be simply absurd to require counsel to object and request a limiting instruction following a court determination to admit such evidence in an unlimited fashion. See United States v. Flecha, supra.

CONCLUSION

For the foregoing reasons and the reasons set forth in the main brief for appellant Stanchich, the judgment of the District Court should be reversed and the indictment dismissed.

Respectfully submitted,

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